No. 2959.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

CITY OF BOZEMAN, a Corporation, JOHN A. LUCE, Mayor of the City of Bozeman, and C. A. SPIETH, City Clerk of the City of Bozeman,
Appellants,

vs.

SWEET, CAUSEY, FOSTER & COMPANY, a corporation, JAMES N. WRIGHT & COMPANY, a Corporation, and C. W. McNEAR & COMPANY, a Corporation,
Appellees.

REPLY BRIEF OF APPELLANTS.

H. D. KREMER,
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Solicitors for Appellants.

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I.

To facilitate the examination of Sub-division 64, of Section 3259, Revised Codes of Montana of 1907, counsel for appellees have set out the different clauses in five paragraphs on pages 3 and 4 of their brief. This vivid presentation of the sub-section we

think serves to make more apparent the contention of appellants in respect to its interpretation, as this arrangement emphasizes the fact that the subject of the sub-section, as disclosed in each paragraph, is *indebtedness*—as it is also the subject of the constitutional provision involved.

As suggested in the brief of appellees, the first paragraph confers upon city councils the power to contract an indebtedness for eight distinct purposes. The second paragraph merely declares the constitutional limit of three per centum for general purposes. The third paragraph adds to the first paragraph by prescribing that indebtedness for two of the eight purposes stated in the first paragraph—water and sewers—may only be incurred after the proposition of creating the indebtedness has been submitted to the taxpayers. In the fourth paragraph the legislature avails itself of the permission conferred by the constitution, and extends the debt limit ten per centum over the three per centum for water and sewer purposes. The fifth paragraph then provides that the above limit of three per centum shall not be extended unless the question shall have been submitted to a vote of the taxpayers. When we consider that the purpose of the sub-section is indebtedness— the creation of indebtedness— we submit that the reasonable interpretation is that the *question* referred to in the fifth paragraph is the question of the creation of the indebtedness.

Again, the constitutional provision is the one enactment to which the statutory provisions involved

in this inquiry must conform, and so far as the statutory provisions are concerned, they stand upon a parity. As previously shown, Section 3455, of the Revised Codes of Montana, as construed in the *Carlson case,* prescribes what the notice of election must contain, and how the vote must be taken. It is not suggested in the brief of appellees, nor in the opinion of the lower court, that there is any conflict between Sub-division 64 of Section 3259 and Section 3455, and we submit that there is none. Neither is it urged that the former section is controlling as against the latter. Under a familiar rule of statutory interpretation, various acts of the legislature pertaining to the same subject are to be construed together, and effect given to the various provisions if possible. Applying this rule, it may be said that if any doubt exists as to what the *question* is that is referred to in the last paragraph of Sub-division 64 of Section 3259, such doubt is removed, and certainty is attained, when we consider that sub-section in connection with Section 3455. The argument of counsel for appellees ignores the provisions of the latter section.

Counsel for appellees say, as did lower court, that the Supreme Court of Montana has not passed on this question. In using the language quoted ~~above~~ from the *Carlson case,* that the question required to be submitted is whether the bonds shall be issued, the court has decided all that is here involved, whether the inquiry there was precisely the same as here, or not. As contended by us in the former brief, the

principle established by the Carlson decision is determinative of the question here. Furthermore, even if it can be said that the language used by the Supreme Court of Montana in the *Arnold case,* quoted from in our former brief, which is explicit on this point, is obiter, it clearly indicates the opinion of the court as to the effect of its former decisions, and particularly that in the *Carlson case.* Certainly, from these various decisions, it must be said that the supreme Court of Montana has indicated that it holds the view of this question which is contended for by appellants.

II.

Counsel for appellees again present in this court the other grounds, set out in their bill of complaint, upon which they have asserted the issue of bonds in question to be illegal, but which were not ruled upon in the lower court, except in the comment in the opinion that they were in part, at least, untenable. The first of these contentions is that the bonds are void because creating an excessive indebtedness.

The only facts necessary to a determination of this question are undisputed, viz: (1) that at the time of the issuance of the bonds in question the general indebtedness of the City of Bozeman was in excess of the authorized three per cent for general purposes; and (2) that the bonds in question constituted the only outstanding bonds or indebtedness of the city for water and sewer purposes, and were within ten per cent of the value of the taxable property of said city.

The contention of appellees is that the whole of the *general* indebtedness of the City of Bozeman—that which is within the three per cent limit, as well as that which is beyond the three per cent limit—is to be added to the amount of these water and sewer bonds, and inasmuch as the total will exceed thirteen per cent of the value of the taxable property in the city, these water and sewer bonds are invalid.

The appellants' contention, on the other hand, is that the ten per cent extension is to be computed independently of the general indebtedness; that the borrowing power conferred upon cities under this extended limit has been created by the legislature, under the Constitution, for special purposes, which cannot be lost or abridged by any improvidence of the city in its general indebtedness; and that, regardless of a city's general indebtedness, this ten per cent extension is yet available for the purposes for which it was set apart.

The appellees' brief, at the top of page 12, correctly shows the indebtedness of the city at the time of the issuance of these bonds. The $100,000 of water bonds were included in the new issue, so that the latter created no new indebtedness. The remainder of the city's indebtedness was made up of the City Hall Bonds aggregating $21,000, Funding Bonds aggregating $166,000, and the floating indebtedness of $975.

The issue of funding bonds to the amount of $166,000. was for the purpose of funding warrants against the various funds of the city outstanding at

the time, which had been issued for general purposes, and none of which had been issued for water or sewer purposes. An examination of the figures shown in the testimony of the witnesses D. S. McLeod and John L. Ketterer (Rec. pp. 112-117), will show that each warrant thus funded was issued at a time when the city had exceeded its three per cent limit, and that therefore each warrant when issued was invalid, which invalidity unquestionably extended to the bonds which funded the warrants. While this showing was made for the purpose of laying all of the facts before the court, they are, in our view of the case entirely immaterial, and it was unnecessary to have shown them at all. As stated above, our contention is that inasmuch as it appears without dispute that the city had no outstanding bonds or indebtedness for water or sewer purposes except the bonds here involved, the only question to be determined is, *Do these issues come within ten per cent of the assessed valuation of property in the City of Bozeman for the year 1915?* If they do, they are valid, notwithstanding the city was at the time indebted for general purposes beyond the three per cent limit.

While under the decisions of the Montana Supreme Court, water and sewer bonds may fall within the three per cent limit, *under the very terms of the constitution itself, general indebtedness can never, under any circumstances, invade the ten per cent extension, which is for water and sewer purposes only.*

In this view of the case, the decision in the case of

Buchanan v. Litchfield, 102 U. S. 278, and the subsequent decisions of the United States Supreme Court which followed it, and which are referred to on page 14 of the brief of appellees, are not pertinent here. These cases are authority for the proposition that the City of Bozeman would be estopped to question the validity of the bonds of the $166,000 funding issue in the hands of innocent purchasers, because of the recital in the bonds that they were issued in full compliance with the constitutional and statutory requirements. These cases merely apply the principle of estoppel, and rest upon the consideration that municipal bonds are negotiable securities which pass from hand to hand; that those who purchase them in the bond markets are not in a position to examine the records and proceedings of the municipality which issued them, and are not required to do so; that such purchasers are warranted in relying upon the statement in the bonds that they are issued in strict conformity with the constitutional and statutory provisions; and that, when such purchasers have parted with value, the municipality is estopped to deny the validity of the bonds. These cases hold that such bonds are valid in the hands of innocent purchasers from the original purchaser. They do not go to the extent of holding that such bonds are valid at the time of sale, as between the municipality and the original purchaser. If so, the argument would be an unhappy one for counsel for appellees, because it would at once dispose of all of their alleged grounds of illegality adversely to them.

The purpose of their argument, however, is to establish that the $166,000. of funding bonds, which carry the general indebtedness beyond the three per cent limit, constitutes an enforcible indebtedness against the City of Bozeman. The law of these cases is not applicable here, because we concede that the City of Bozeman had, at the time of the issuance of these bonds, a general indebtedness in excess of three per cent, and contend that the ten per cent extension for water and sewer purposes was not affected thereby.

The Supreme Court of Montana in various cases has considered almost every phase of the constitutional and statutory provisions here involved, and has quite clearly made the distinction that while water and sewer bonds may fall within the three per cent limit to the extent that any margin thereof may remain at the time of their issuance, yet general indebtedness can never encroach upon the ten per cent extension, which is reserved for bonds or indebtedness for water and sewer purposes only. That is, the three per cent limit, which comprehends indebtedness of every kind, may include water and sewer indebtedness, whereas the ten per cent extension, which is limited to specific purposes, cannot be invaded for other purposes—the general purpose can include specific purposes, but the specific purpose can not be stretched to include general purposes.

Lepley v. City of Fort Benton, 51 Mont. 551, 154 Pac. 710;

Arnold v. City of Miles City, 46 Mont. 478, 128 Pac. 915;

Butler v. Andrus, 35 Mont. 575.

The precise principle here contended for is stated in the case last cited, page 581, as follows:

> "The proviso under which the legislature may authorize an extension of the limit is also clear in purpose, to-wit, to allow an extension of this limit when such extension (increase) is necessary to construct a sewerage system or procure a water supply. *It cannot be granted or be made available for any other purpose or under any other circumstances than those which create the necessity for it.*"

This question has also been passed upon by the Supreme Courts of the states of South Dakota and Utah, in construing constitutional provisions entirely analogous to our own, in the cases of

Wells v. City of Sioux Falls, 16 S. D. 547, 94 N. W. 425;

People v. City Council, (Utah) 64 Pac. 460.

Both of these cases squarely hold that the extended limit for special purposes is entirely separate and distinct from the limit for general indebtedness, and that a city may incur legal indebtedness to the full amount of the extension for the special purposes prescribed, notwithstanding the limit for general purposes has been exceeded.

In the former case it is said:

> "The existence of a large municipal debt does not render an adequate water supply less necessary or beneficial. Indeed, the ability to provide pure water for domestic uses may become absolutely essential to the procurement and retention of a population sufficient to meet existing municipal obligations. The Constitution of Utah contains provisions strikingly analogous to those under discussion. Says the Supreme Court of that state: 'The limited restriction and the restricted grant to create indebtedness are essentially independent and distinct, and the general and special debts which they authorize are separated by their purposes and the separate powers under which they must be incurred. This would clearly be the natural operation and effect of the two 4 per cent. limits in the absence of any contingency, such as a decrease in the valuation of the taxable property, which would cause the 4 per cent. of the valuation under the general power to be less than the indebtedness. But the happening of such a contingency cannot change the purpose and natural operation of the section, nor affect the special power under which the municipality in this case seeks to act.' People v. City Council (Utah) 64 Pac. 460. Concurring in the view thus clearly expressed, we cannot escape the conclusion that the validity of the bonds involved in this action is not affected by the defendant city's existing indebtedness for general purposes."

In the case of *Ashelot National Bank v. Lyon County, 81 Fed. 127,* it was held that the bonds of

a municipal corporation which are void because in excess of the constitutional limit of indebtedness are not to be counted in estimating the indebtedness of the corporation with reference to the validity of another issue of bonds.

III.

Counsel next briefly present the third alleged ground of invalidity of the bonds—that there was a dual submission in the grouping together as one question the proposition of the issuance of the water funding bonds, and of the new water bonds for extensions of the system. This question, however, has also been disposed of by the decisions of the Montana Supreme Court.

In the *Carlson case,* previously referred to, the court said:

> "Counsel insist that Ordinance No. 717 is void in that it contains two subjects, and is obnoxious to the prohibition contained in section 3265 of the Revised Codes, which declares '* * * No ordinance shall be passed containing more than one subject, which shall be clearly expressed in its title, except ordinances for the codification and revision of ordinances.' This provision imposes the same restriction upon the city council as is imposed by the Constitution upon the legislature (Constitution, Art. IV, Sec. 23), and the purpose is the same. This purpose is pointed out in *State v. McKinney,* 29 Mont. 373, 74 Pac. 1095, and the cases on the subject are there collated. The observance of the limi-

tation is mandatory, and renders void any ordinance which violates it. But whatever is germane, incidental or necessary in the main or general subject of an ordinance may be included in it and is not a separate subject. *(State v. McKinney, supra.)* The general subject of ordinance 717 is the incurring of the indebtedness by the city. The different purposes named as making this necessary are matters of detail for the information of the tax payers. The ordinance is not objectionable for the reason urged."

28 Cyc. 1590;

McQuillan on Municipal Corporations, Vol. 5, Sec. 2198.

In the case of *Stern v. Fargo, 26 L. R. A. (N. S.) 665,* principally relied upon by counsel for appellees, is a leading case on the subject, and collates the authorities. It illustrates the distinction made by the courts, which runs through all of the decisions on the subject, between cases where the propositions submitted are so related as to effect one purpose, and those in which they are so unrelated as to effect two or more purposes. The court there holds that *the test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary connection with each other; and if they have not, two purposes cannot be made one by verbal connection.*

In the case of *Blaine v. Hamilton, 16 Pac. 1076,*

35 L. R. A. (N. S.) 577 (Wash.), a case cited in appellees' brief, it is said that the true criterion is:

> *"Are the several parts of the projects so related that united they form, in fact, but one rounded whole?"*

It is submitted that an analysis of the cases on the subject will disclose that the above constitute terse statements of the rule to be deduced from all of them. For the purpose of illustrating the distinction we subjoin brief statements of the holdings in what will be found to be typical cases.

In the case of *Stern v. Fargo, supra,* the resolution of the city council provided for the issuance of $100,000 in bonds, for the purpose of defraying the cost of building and constructing a new water works pumping station, and for the purpose also of installing an electric light plant. The court held that while the two might be operated together, and that the same boilers might be used both for pumping and furnishing light, thus bringing about economy in operation, yet there were two distinct purposes which were not related one to the other.

In the case of *Oakland v. Thompson, 151 Cal 572, 91 Pac. 387,* the issuance of the bonds was for several separate parks, and it was held that there was but one purpose.

In the case of *Linn v. City of Omaha, 76 Neb. 552, 107 N. W. 983,* the bonds were to be issued to construct two fire engine houses, and it was held that there was but one purpose.

In the case of *People of Mariposa County v. Counts, 89 Cal. 15, 26 Pac. 612,* the object was to raise money for the construction of two separate wagon roads, and it was held that there was but one purpose.

In the case of *Louisville v. Park Commissioners, 112 Ky. 409, 65 S. W. 860,* the money was to be expended for city parks and sewers, and it was held that there was but one purpose.

In the case of *State ex rel City of Chillicothe v. Wilder, 200 Mo. 97, 98 S. W. 465,* the purpose was to construct a combined water works and electric plant, and the court held that there was but a single purpose.

In the case of *Cary v. Blodgett, 10 Cal. App. 463, 102 Pac. 668,* the purpose was to construct a combined water and light plant, and the court held that there was but a single purpose.

In the case of *Hughes v. Horsky, (N. D.) 122 N. W. 799,* the purpose was to erect a court house and jail, and the court held that there was but a single purpose.

In the case of *Manley v. Pueblo County, 46 Colo. 491, 104 Pac. 1045,* the purpose of the bonds was to refund two previous bond issues, and the court held that there was but a single purpose.

The case of *Blaine v. Hamilton,* quoted from above, sustains four different propositions to make one harbor as being one purpose, distinguishing that case from the case of *Blaine v. City of Seattle, 114 Pac. 164,* where there was submitted to the people

for a single affirmative or negative vote the proposition of bonding the city for specific sums for sites for firehouses, site for city stables, for the construction of fire houses, for a combined firehouse and dock, for a police station, for an isolation hospital, for a bridge on Spokane Avenue and for a bridge on Westlake Avenue. The latter was held to be in violation of the constitution and general laws in that they combined several non-related propositions.

In the case of *Tulloch v. City of Seattle, 124 Pac. 483, (Wash.),* the proposition was to issue bonds for the purchase of existing street railway lines, or in case such purchase was not deemed wise, the construction of a parallel line, and it was held that these were not several and distinct purposes so as to render a joint submission thereof invalid. In that case the court said:

> "It must be conceded that cases may be found, such as Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, Stern v. Fargo, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665, and Elyria Gas. Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335, from which might be deduced a rule supporting appellant's contention; but those cases, as applied to purposes naturally related, are not in harmony with our holding in Blaine v. Hamilton, and for that reason cannot be regarded as authoritative here. Their reasoning is more in accord with a state of facts similar to these submitted in Blaine v. Seattle, where the propositions as submitted are unrelated and have no natural connection one with

the other, and for that reason they are there cited as supporting the holding.

"All of the cases dealing with this question of related or unrelated purposes or objects are more or less influenced by the special provisions of Constitutions, statutes and ordinances, but running through them all may be found two easily distinguished principles. Separate, distinct, and independent purposes or objects may not be joined in one proposition for submission to the voter. United, related and dependent objects, that together form one general scheme or plan, may be united and submitted as one. No better illustrations of the application of these two principles may be found than in Blaine v. Seattle falling within the first rule, and Blaine v. Hamilton falling within the second rule. The case at bar belongs to the second class, and, adopting the reasoning employed in cases of that character, we hold there is no legal objection to the method employed in submitting this question of municipal ownership of street railways to the people, as definitely outlined in the ordinance and proposition whereby it was called to their attention; and their judgment, whether wise or unwise, good or bad, must be upheld."

In the case of *Hartigan v. Los Angeles, 149 Pac. 590, (Cal.),* the purpose was to acquire and construct "works for supplying said city (Los Angeles) and its inhabitants with electricity for the purposes of light, heat and power, including the construction or acquisition of electric generating works, receiving substations, transmission lines, and the acquisition

of lands, water rights, rights of way, machinery, apparatus, and other works and property necessary therefor; * * * also including the construction or acquisition of distributing lines, conduits, and substations, and the acquisition of lands, rights of way, machinery, apparatus and other works and property necessary therefor." Part of the proceeds from the bond issue was intended to be used in the completion of partly constructed work and the remainder for new work. It was held that there was a single purpose in the submission.

In the case of *Chandler v. City of Seattle, 80 Wash. 154, 141 Pac. 331,* the question submitted was the issuance of bonds for the enlargement and extension of the municipal lighting plant by the acquisition of lands for a site for a steam power plant for furnishing electricity for lighting, heating, fuel and power purposes, and for furnishing steam for heating purposes. It was held not objectionable as combining several unrelated purposes, the purpose being to have one efficient lighting system ready at all times to serve the people.

In the case of *Clark v. City of Los Angeles, 160 Cal. 317, 116 Pac. 966,* the purpose was to construct docks, wharves and harbors, and the opening, improving, construction and maintaining of streets and highways to navigable waters, the construction and maintaining of canals and water ways, and the acquisition of all necessary lands for the improvements. This was not held objectionable as submitting distinct propositions in a single question, the

contemplated improvements being of the same character, and all relating to the improvement of one harbor.

The case of *Ostrander v. City of Salmon, 20 Ida. 153, 117 Pac. 692,* is an interesting case on this subject, and illustrates the distinction between what is a dual question and what is a single question. There the question submitted was the issuance of bonds to the amount of $30,000 to purchase a water system of the Salmon City Water Company, also to issue bonds to the amount of not to exceed $15,000 to enlarge and extend the water system, and bonds to the amount of $5000 to be expended for a public building and building site. It was held by the court that the issuance of the $30,000 of bonds to purchase the water system and the $15,000 of bonds to enlarge the same constituted one related purpose, whereas the issuance of the bonds for $5,000 added a second proposition, and made the election void.

In the case of *Hurd v. City of Fairbury, 87 Neb. 745, 128 N. W. 638,* the submission was "for the purpose of purchasing or erecting, constructing, locating, and maintaining a system of water works within said city." It was held that the submission was not either dual or alternative.

Counsel for appellees cite the case of *McBryde v. City of Montesano, 34 Pac. 559,* as being directly in point and determinative of the question here involved. While a casual reading of the syllabus might give this impression, an examination of the decision will disclose that it is in harmony with the

other decisions on the subject. If, as here, the indebtedness to be funded had been for the same purpose as the new bonds, the cases would be analogous, but that was not the case. The indebtedness there funded had been created for various purposes—there were outstanding $6,000 of warrants for constructing an elevated railway, $6,224.75 of light warrants for an electric light plant, and $7,775.25 of warrants for general purposes. The new issue was to be for the sum of $5,000 for the purchase of fire apparatus to the amount of $1,500, and for the purchase of a lot of land and the erection of a city hall and jail thereon to the amount of $3,500. It will be observed that the new bonds were even for a dual purpose, which would have to be condemned in the light of the cases cited above. The later Washington cases, and especially that of *Tulloch v. City of Seattle,* quoted from above, show that the rule in that state is in harmony with the authorities elsewhere on this subject.

There is a further consideration which, incidentally, was the reason for the action of the city in joining the proposition of the funding of the old water bonds and of the issuance of the new water bonds in one submission. Sec. 6 of Art. XIII, of the Constitution of Montana, which contains the authority for the issuance of these bonds, imposes the condition not only that the city shall own and control its water supply, but that it *devote the revenues derived therefrom to the payment of the debt.* The city had outstanding the $100,000 of old water bonds which were

funded. Its revenues were pledged to the payment of that issue. To make any legal issue of water bonds such revenues must be so pledged. Had the city left the old bonds outstanding, and made a new issue of water bonds for the purpose of extending the system, a very serious question would have arisen as to its power to effectively pledge these revenues to the paymenet of the new bonds while they were still pledged to the payment of the old issue. It would seem that this pledge is indivisible, and that there could not be any pro rating of it among various issues. It was to save this question that the old bonds were funded, and the two were included in the same submission.

We respectfully submit that the bonds in question were legally issued, and that for the reasons stated in this brief and those stated in the former brief the judgment of the lower court should be reversed.

Respectfully submitted,

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